No. 15674

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES NATHAN LOWERY,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

I. STATEMENT OF JURISDICTION AND STATE OF THE RECORD

The appellant, JAMES NATHAN LOWERY, was indicted in the District Court of the United States for the Western District of Washington, Northern Division, in cause No. 49515, on September 12, 1956.

The indictment was framed in eight counts, alleging violations of the following sections of the federal narcotic laws at different times on May 16, 1956 — Section 174, Title 21, United States Code; Section 4705(a), Title 26, United States Code; and Section 4704(a), Title 26, United States Code.

Jurisdiction was conferred upon the District Court of the United States for the Western District of Washington, Northern Division, pursuant to the provisions of Section 3231, Title 18, United States Code. Inasmuch as the indictment charged the appellant with having illegally received, concealed, sold and given away the narcotic drugs in question at Seattle, Washington, venue was properly laid in said District Court under the provisions of Rule 18 of the Federal Rules of Criminal Procedure and Section 3237, Title 18, United States Code.

Trial by jury was had, and a verdict of guilty was returned on all eight counts on January 4, 1957. Sentence was imposed and notice of appeal was filed on January 18, 1957.

The jurisdiction of this Court to review the judgment of the District Court is conferred by the provisions of Section 1291, Title 28, United States Code.

Though the appellant gave notice of appeal on January 18, 1957, the docket fee was not received by

this Court until August 21, 1957. Thereafter, and on October 15, 1957, this Court endorsed an order granting appellant's request to proceed on typewritten transcript of the trial court proceedings and typewritten briefs.

Since that date appellant has filed and served a typewritten brief, but has furnished no transcript of the trial court proceedings except for a transcription of the proceedings occurring at the time the trial court denied his motion for new trial and imposed judgment and sentence.

However, we are not at quite as impossible a situation as would normally be the case where there was no transcript of the trial proceedings inasmuch as at least some of what appellant now cites as error relates to pretrial matters presently before this Court as inclusions in the District Court Clerk's transmission of original papers, or to other issues determinable without recourse to all the testimony.

II. STATEMENT OF APPELLANT'S CONTENTIONS

Appellant contends that the Government should never have been permitted to bring him to trial because the evidence seized from his person and his premises on May 16, 1956, should have been suppressed.

His argument in this regard is that the evidence was seized pursuant to a search warrant which was only obtained on the basis of a perjured affidavit made before the United States Commissioner, and furthermore that the search was actually made on premises other than those specified and resulted in a seizure of objects other than those specified in the warrant.

In addition, appellant claims, assuming that he should have been tried, that he was denied a fair trial. His argument here raises three points — one, that his trial was unfairly conducted because the Government informant was not present; secondly, his trial was unfair because the Government was permitted to use the illegally seized evidence earlier alluded to; and finally, a fair trial was denied him because of the prejudicial testimony of a federal narcotic agent.

III. SUMMARY OF APPELLEE'S ARGUMENT

We contend that the affidavits made by the informant, C. B. Mitchell, and narcotic agent Charles Dupuis, on May 16, 1956, provided a proper basis for issuance of the search warrant and that such affidavits were truthful in every respect. Furthermore, we state unequivocally that the search was conducted only on the premises described in the search warrant, and that all property and objects seized were legally obtained under the search warrant or as an incident

to the lawful arrest of the appellant made pursuant to the warrant of arrest and executed at the same time.

It is also our position that the appellant received a fair trial in every respect, that he was properly confronted by his accusers, and was convicted by the overwhelming conclusiveness of correctly received evidence. And, finally, we are satisfied that what is charged as prejudicial was but a non-maliciously inspired fleeting incident properly stricken by the trial court which in the context of these proceedings had no influence upon the jury's verdict.

IV. APPELLEE'S ARGUMENT

Rule 41(c) of the Federal Rules of Criminal Procedure provides in part as follows:

> "A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

In this case conformity with the foregoing was absolute, and the affidavits of Mitchell and Dupuis stated facts conclusively establishing probable cause for believing the existence of grounds on which the warrant was issued. The affidavits themselves

are included in the commissioner's transcripts filed with the District Clerk for the Western District of Washington on June 20, 1956. These transcripts, which are included among the items forwarded to this Court by the District Clerk for the Western District of Washington, disclose that both affiants appeared before the commissioner at a time only one or two hours after the special employee-informant had been at the particular premises as described in the search warrant and on those premises had purchased narcotics from the appellant.

The affidavit of Mitchell states fully and completely all of the circumstances relating to the sale of narcotics to him by the appellant and goes into background information with regard to his contacts with the appellant during the period of time preceding the transaction of May 16, 1956. Agent Dupuis in his sworn affidavit details very explicitly the part that he played in the purchase of narcotics as made by Mitchell from the appellant and sets forth all of his observations of the special employee together with his search of him before the purchase and a search of him immediately thereafter. There can be no question but what, on the basis of these two sworn affidavits, the United States Commissioner properly found probable cause existed to believe that heroin hydrochloride was on the person and on the premises as set forth in the body

of the search warrant itself. At all times material, both affiants were duly and properly under oath.

The search warrant itself also forms a part of these commissioner's transcripts now before this Court. This search warrant shows that it was issued by the commissioner upon the affidavits given and as referred to herein, and authorized a search for heroin hydrochloride at an apartment at the premises of 614 Weller Street occupied by Lowery, and described as unnumbered and unlettered, but entered through the door immediately to the left of the stairway which enters from Weller Street (first floor above the street level), and further authorized a search of appellant's person.

Also included among the papers transmitted to this Court by the District Court Clerk is another affidavit of Charles F. Dupuis, the narcotic agent who appeared before the commissioner, and one of James M. Clark, the deputy marshal who accompanied the narcotic agents at the time of search and seizure, which affidavits were filed with the District Court at the time the appellant herein made his motion to suppress prior to trial. Both of these affidavits categorically state that only the described premises and the person of the individual named, this appellant, were searched.

A further fact pointed out in both of these affidavits is that Deputy Marshal Clark was also in possession of a warrant of arrest for appellant. Thus the seizure of the small measuring spoon containing traces of heroin hydrochloride at the described premises and the seizure of the thirty-five dollars marked United States currency furnished to the informant to purchase narcotic evidence from appellant were simply seizures made incidental to lawful arrest.

At the time of trial, the Government produced a chemist, four members of the narcotic detail of the Seattle Police Department, two federal narcotic agents, and the district supervisor of the Bureau of Narcotics. There was a wealth of evidence which, of course, could only be fully reflected by examination of the full trial court proceedings, but it is certainly self evident that the absence of the special employee-informant could not operate so as to make prosecution untenable as appellant now maintains. A subpoena was directed to the special employee at his last known address, the Oregon State Hospital, Salem, Oregon, and the "not found" return of the marshal is also included, as the 21st item, among the papers forwarded by the District Clerk.

There is no need to review appellant's claim that illegally seized evidence was improperly introduced

during trial inasmuch as this claim is framed no differently than that already discussed relating to the search and seizure.

Appellant's final point of argument relates to a portion of Agent Dupuis' testimony during trial. In this regard, there is also included in the papers submitted by the District Clerk, as item No. 17, the Government's memorandum in opposition to appellant's motion for new trial. On the first page of that document we are made aware as to what matters Dupuis was testifying. He was relating a conversation between District Narcotic Supervisor Crisler, himself, and the appellant, JAMES NATHAN LOWERY, ofttimes referred to as Sonny.

Dupuis testified that the appellant inquired as to whether there was "anything he could do to help himself". Following this, the testimony of Dupuis continued:

> "Sonny was talking about the maximum he would have to do and the minimum he would have to do and Mr. Crisler advised him in that our position was that he was a third time violator — —"

Motion for mistrial was made, the jury was excused, discussion ensued, and the motion was denied. The Court struck the answer of the witness and im-

mediately upon the jury's return admonished them as follows:

> "Members of the jury, the Court is going to strike the last answer of the witness with respect to what Mr. Crisler said to him, or what consideration was being given by them in that converversation, and ask that you disregard it entirely and give it no credence whatsoever."

Was this stricken testimony so positively prejudicial as to have substantially influenced the verdict of the jury? We feel that this can best be answered by reviewing the language of the trial court at the time of denying the motion for new trial which appears on page 6 of the transcript excerpt submitted by appellant to this Court. The trial court stated as follows:

> "THE COURT: Mr. Goodloe, I have considered that matter. I don't wish to indicate that a statement like that by a witness is not serious. If it were not serious, the Court wouldn't even strike it, perhaps.
>
> "On the other hand, the Court has to weigh, on a motion for a new trial based on that type of error, whether or not in view of the striking of the testimony and the admonition given the jury to disregard it, whether in view of all the testimony and the balance of the trial, over all, was the Defendant afforded a fair and impartial trial.
>
> "Bearing that in mind and having in mind the nature of the testimony which was rather — on the part of the Government — rather voluminous, I thought, and particularly in view of the lack of a defense, actually — this case was submitted solely on the Government's proof. I feel that the

Defendant did have a fair trial and that the motion for new trial should be denied."

This Court of Appeals has considered this almost identical situation before, and has on that occasion ruled that prompt action by the trial court operates to cure any error. This view was very fully expressed in the decision in the case of *Stoppelli* v. *United States*, 183 F. 2d 391, 394, 395 (9 Cir. 1950), cert. denied 71 S.Ct. 88. The opinion therein sets out two, and not just one, seemingly volunteered answers by a Government witness in the following language:

"Appellant claims he was deprived of a fair trial by the alleged misconduct of the government fingerprint witness, Greene, in volunteering answers. The portion of the record pertaining to this matter follows:

'Q. Now how did you come to that conclusion that the print on the envelope is the print that belonged to John Stoppelli, the defendant?

'A. We have a national book every district supervisor in the country, in the Narcotics Bureau, has a national book published by the Narcotics Bureau, all of the major known—'

'A. In my opinion he grasped it this way (indicating) which would be the natural way for placing something in the envelope with the right hand and, after all, men of experience of that type —.'

"There is no merit in this complaint. The trial judge fully covered the matter by immediate appropriate instructions. We hold the incident to have had no substantial adverse effect upon the

> fairness of the trial. It was but a transitory incident not proximately derogating from the intrinsic fairness of the trial. In a similar situation, the Court of Appeals of the Third Circuit ruled as we do. United States v. Curzio, 179 F. 2d 380. See also, Marsh v. U. S., 3 Cir., 82 F. 2d 703."

The recent Second Circuit case of *United States* v. *Apuzzo*, 245 F. 2d 416 (1957), is entirely devoted to this type of situation; namely, a statement of a Government witness disclosing a prior conviction for the same offense as that charged in the case on trial. It is there at page 425 that the test we have set up for ourselves is posed.

> "'The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.' Kotteakos v. United States, 1946, 328 U.S. 750, 762, 764-765, 66 S.Ct. 1239, 1246, 90 L.Ed. 1557."

Throughout the *Apuzzo* decision, great emphasis is laid on the action of the trial court which, in the instant situation, was the immediate and forthright statement to the jury properly reiterated in the general instructions in a manner to not unduly emphasize the testimony. As Judge Waterman states in conclusion in the *Apuzzo* case, supra, at page 427:

"The erroneous introduction of an alleged statement by defendant that he had been previously arrested for a similar activity may be considered of such an exceptionally prejudicial character as to necessitate a new trial. See, e.g., United States v. James, supra. But the general rule is that where evidence is erroneously admitted the subsequent striking of it from the case, accompanied by a clear and positive instruction to the jury to disregard the evidence, cures the error. United States v. Giallo, 2 Cir., 1953, 206 F. 2d 207, affirmed 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421; United States v. Curzio, 3 Cir., 1950, 179 F. 2d 380; Marsh v. United State, 3 Cir., 1936, 82 F. 2d 703; Stoppelli v. United States, 9 Cir., 1950, 183 F. 2d 391; Samish v. United States, 9 Cir., 1955, 223 F. 2d 358. I believe that the circumstances of this case warrant the application here of that general rule."

V. CONCLUSION

Because we believe that the appellant was accorded a fair trial and was convicted by the overwhelming weight of substantial evidence, we ask that the judgment be affirmed.

Respectfully submitted,

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Assistant United States Attorney